SUPREME COURT, U. S.

FILED

NOV 15 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-560

ALLIS-CHALMERS MANUFACTURING COMPANY,
Petitioner,

v.

GULF & WESTERN INDUSTRIES, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

WHITNEY NORTH SEYMOUR
One Battery Park Plaza
New York, New York 10004
Counsel for Gulf & Western Industries, Inc.

Of Counsel:

JOHN A. GUZZETTA
BERNHARDT K. WEUBLE
CONRAD K. HARPER
LINDSAY A. LOVEJOY, JR.
Simpson Thacher & Bartlett

INDEX

	PAGE
Statement	1
Restatement of The Question Presented	2
Restatement of the Case	2
A. Background of the Exchange Offer	3
B. G&W's Effort to Provide Full Disclosure in the Exchange Offer	4
C. The Exchange Offer and Continuing Disclosure	5
D. Allis' Isolation of G&W Subsequent to the Exchange Offer	6
E. Oppenheimer Purchase and the October 21 Press Release	7
F. G&W's Sale of Allis Stock	9
G. Subsequent Events	10
The Proceedings Below	11
A. The District Court	11
B. The Court of Appeals	12
The Decision Below on the Question Presented Should be Summarily Affirmed if Certiorari is Granted; Alternatively, the Writ May Properly be Denied	15
Conclusion	27

TABLE OF AUTHORITIES

Cases

PAGE

Abrams v. *Occidental Petroleum Corp.*, 450 F.2d 157 (2 Cir. 1971), *aff'd sub nom. Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973) 24

Adler v. *Klawans*, 267 F.2d 840 (2 Cir. 1959) 19

Allis-Chalmers Manufacturing Co. v. *White Consolidated Industries, Inc.*, 294 F. Supp. 1263 (D. Del.), *rev'd*, 414 F.2d 506 (3 Cir. 1969) 10, 11

Arkansas-Louisiana Gas Co. v. *W. R. Stephens Investment Co.*, 141 F. Supp. 841 (W. D. Ark. 1956) 17

Escott v. *BarChris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968) 22

Ferraiolo v. *Newman*, 259 F.2d 342 (6 Cir. 1958), *cert. denied*, 359 U.S. 927 (1959) 23

Gold v. *Sloan*, 486 F.2d 340 (4 Cir. 1973), *cert. denied*, 419 U.S. 873 (1974) 18, 20, 21, 24

Heit v. *Weitzen*, 402 F.2d 909 (2 Cir. 1968), *cert. denied*, 395 U.S. 903 (1969) 22

Kern County Land Co. v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973) 16, 19, 20, 21, 22, 23, 24, 26

Newmark v. *RKO General, Inc.*, 425 F.2d 348 (2 Cir.), *cert. denied*, 400 U. S. 854 (1970) 18, 23

Perine v. *William Norton & Co.*, 509 F.2d 114 (2 Cir. 1974) 19, 22

Petteys v. *Butler*, 367 F.2d 528 (8 Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967) 23

Provident Securities Co. v. *Foremost-McKesson, Inc.*, 506 F.2d 601 (9 Cir. 1974), *cert. granted*, 420 U.S. 923 (1975) 1, 12, 15

PAGE

Reliance Electric Co. v. *Emerson Electric Co.*, 404 U.S. 418 (1972) 14, 17, 18, 21, 26

Roberts v. *Eaton*, 212 F.2d 82 (2 Cir.), *cert. denied*, 348 U.S. 827 (1954) 23

S.E.C. v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2 Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) 22

Stella v. *Graham-Paige Motors Corp.*, 104 F. Supp. 957 (S.D.N.Y. 1952), *aff'd*, 232 F.2d 299 (2 Cir.), *cert. denied*, 352 U.S. 831 (1956) 17

Stella v. *Graham-Paige Motors Corp.*, 232 F.2d 299 (2 Cir.), *cert. denied*, 352 U.S. 831 (1956) 17

Statutes

Securities Act of 1933:

Section 11, 15 U.S.C. § 77k 22

Section 12, 15 U.S.C. §77*l* 22

Section 17, 15 U.S.C. § 77q 22

Section 24, 15 U.S.C. § 77x 22

Securities Exchange Act of 1934:

Section 10, 15 U.S.C. § 78j 22

Section 13(d)-(e), 15 U.S.C. § 78m(d)-(e) 16

Section 14(d)-(f), 15 U.S.C. § 78n(d)-(f) 16

Section 16(b), 15 U.S.C. § 78 p(b) 2, 12, 17, 20, 21

Legislative Materials

Hearings on S. Res. 84 & S. Res. 97 Before the Senate Comm. on Banking and Currency, 73d Cong., 2d Sess. (1934) 25

Hearings on H.R. 7852 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) 25

H.R. 7852, 73d Cong., 2d Sess. (1934) 25

H.R. 9323, 73d Cong., 2d Sess. (1934) 26

S. 2693, 73d Cong., 2d Sess. (1934) 25

SEC Rules

PAGE

SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 ..... 18, 22

SEC Rule 16b-2, 17 C.F.R. § 240.16b-2 19

SEC Rule 409, 17 C.F.R. § 230.409 ..... 4, 16, 22

Gen Instr. F to SEC Form S-1, 2 CCH FED. SEC. L. REP. ¶ 8006 at 7016 ..... 4, 16, 22

Publications

Comment, *Section 16(b): An Alternative Approach To The Six-Month Limitation Period,* 20 U.C.L.A. L. REV. 1289 (1973) 18, 21, 22

A. Fleischer & R. Mundheim, *Corporate Acquisition by Tender Offer,* 115 U. PA. L. REV. 317 (1967) 20, 21

Note, *Insider Liability for Short-Swing Profits: The Substance and Function of the Pragmatic Approach,* 72 MICH. L. REV. 592 (1974) 22, 23

Note, *Stock Exchanges Pursuant to Corporate Consolidation: A Section 16(b) "Purchase or Sale"?,* 117 U. PA. L. REV. 1034 (1969) 19

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-580

ALLIS-CHALMERS MANUFACTURING COMPANY,
Petitioner,

v.

GULF & WESTERN INDUSTRIES, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Gulf & Western Industries, Inc. ("G&W") submits this memorandum in opposition to the petition for a writ of certiorari filed by Allis-Chalmers Manufacturing Company ("Allis") on October 16, 1975. Because of the Court's current review of *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, No. 74-742, which involves the same issue on different facts, G&W does not believe it appropriate formally to oppose the granting of such petition, but does oppose the arguments made and result sought by petitioner, and it submits that the holding below should be summarily affirmed.

Moreover, we submit that the writ may properly be denied and the decision below left to stand because the circumstances of the instant case differ significantly from those in the *Foremost-McKesson* case, and the decision below was correctly decided as to liability. G&W was an undisputed "outsider" when it acquired its Allis shares, did so in an Exchange Offer involving extensive federal

regulation and disclosure, was treated by Allis as an "undesirable suitor" and "unwanted mate", and sold only after extensive disclosure was again made. No abuse of inside information did occur or possibly could have occurred, and the statutory purpose cannot be served by the imposition of liability. The result below should stand in any event.

G&W also proposes to file a petition for a cross-writ of certiorari to review a different aspect of the decision below concerning valuation within the time allowed.

Restatement of the Question Presented[1]

Whether the purchase by which an outsider—which has no prior relationship to the issuer and never becomes an officer or director—acquires more than ten percent of a class of such issuer's securities must be included as a § 16(b) transaction, despite the statutory proviso mandating that § 16(b) "shall not be construed" to cover such a transaction, where the acquisition was preceded by full disclosure as to the issuer's financial condition and where there was "no possibility under the facts of this case" (*5a*) that such outsider could have used inside information in its acquisition.

Restatement of the Case

Petitioner omits so many facts relevant to the decision below that it is necessary to submit this counterstatement.

---

1. Pursuant to Rule 21, G&W has requested the Clerk of the Court of Appeals for the Seventh Circuit to transmit the printed joint appendix, agreed upon by both parties for use in the court below, to this Court. Citations in the text in the form "(5a)" are to the joint appendix; other citations are to trial exhibits not included in the appendix. Because petitioner has chosen a form of pagination for its appendix to the petition which is identical to that of the joint appendix, we have distinguished the two citations by using italics for citations to petitioner's appendix, *e.g.*, "*(5a)*".

A. Background of the Exchange Offer

In early 1967 Allis' earnings dropped sharply (636a-37a) and the decline continued into 1968 (610a, 641a, 1132a). Allis became involved in several announced merger attempts which, however, were abandoned because of discouragement by Allis' management or apprehension of business risks. (Dx-JJJJ-1, at 16, 18-25). A California investment firm, claiming unhappy Allis shareholders as clients, encouraged G&W to seek an interest in Allis (315a). On May 6, 1968 Charles G. Bluhdorn, G&W's chairman, and David N. Judelson, G&W's president, advised Allis' then chairman, Robert S. Stevenson, that G&W was contemplating an exchange offer for Allis and would keep Allis informed (317a, 588a-89a, 1316a-19a; Dx-JJJJ-1 at 29-30). Bluhdorn affirmed to Stevenson that G&W sought no control of or directorships in Allis (*id.*, 30-31, 34).

On May 7 Bluhdorn told Stevenson that disclosure rules required G&W to announce the Exchange Offer immediately, and pointed out that Allis' financial statements would be required for the offering Prospectus. Stevenson said Allis would cooperate (319a, 592a, 1317a, Dx-JJJJ-1 at 39-41), but pressed Bluhdorn again to confirm that G&W sought no merger or control. (592a-95a, 1317a-19a, 1400a-02a, Dx-JJJJ-1 at 41-42). That day G&W announced that pursuant to a Registration Statement it would make an Exchange Offer to all Allis shareholders to acquire up to 3,000,000 Allis shares on a pro rata basis, offering in exchange for each share:

(a) $11.50 in cash;

(b) $12.50 principal amount of 6% G&W Subordinated 20-year debenture due 1988 (the "G&W 6% Debenture"); and

(c) 9/10 of a 10-year G&W Warrant to purchase G&W common stock at $55 per share (the "G&W Warrant")

(593a, 1400a-01a), and this was immediately carried on the Dow Jones "broad tape" (1402a).

B. G&W's Effort to Provide Full Disclosure in the Exchange Offer

G&W's counsel on May 10 requested the cooperation of Allis' general attorney in preparing the Exchange Offer Registration Statement and Prospectus, as required by SEC rules to provide full disclosure of Allis' current condition[2] (1430a). Stevenson was so advised, and on May 17 Allis replied that it would "do anything within reason to cooperate in furnishing material for such registration statement" (1405a), and alerted its independent accountants (1407a). Counsel for Allis, G&W and several investment bankers conferred continually and scheduled a disclosure conference at Allis' headquarters for June 20 (526a-27a, 1547a).

On June 14 Stevenson arranged a meeting with Allis' officers and counsel to precede the disclosure meeting (1547a). Then, on his own initiative, he went to G&W's headquarters on June 18 and saw Judelson, in Bluhdorn's absence (609a; Dx-JJJJ-1 at 60). He said that he told Judelson only by way of an unspecified, numberless "inkle" that the "direction" of Allis' "earnings" was "downward" (610a-11a; Dx-JJJJ-1 at 61).[3] He explained that he visited G&W because he knew G&W was preparing disclosure documents and "didn't want any omissions or overstate-

---

2. SEC Rule 409, 17 C.F.R. § 230.409; General Instruction F to SEC Form S-1, 2 CCH FED. SEC. L. REP. ¶ 8006 at 7016. G&W offered to and did reimburse Allis for all its fees and expenses in connection with disclosure. The information regarding Allis was to appear in other registration statements for other transactions, and a number of other investment bankers' counsel were therefore very concerned with the propriety of disclosure (1408a).

3. Afterwards, Stevenson claimed he got his impression from what he called a "grid", which was at no time mentioned or shown to anyone at G&W (656a, 675a).

ments" (659a-60a; Dx-JJJJ-1 at 61-62), but used the opportunity to discourage G&W's acquisition (Dx-YYY at 14-16; 611a; Dx-JJJJ at 61-65).

At the June 20 disclosure meeting Allis' representatives and counsel for G&W and the investment firms cooperated in securing and reviewing detailed information concerning Allis and formulating language to convey the information fully in the Prospectus (538a-39a). Allis' management and counsel critically reviewed the Prospectus disclosure (543a-44a). Allis' counsel cautioned management that all current statements "must be true on the effective date" and urged a "careful review" to ensure "accuracy and completeness" (1409a).

It was undisputed that G&W published all the material facts about Allis' business and financial condition in the Prospectus (1123a-41a) under the title "INFORMATION CONCERNING ALLIS-CHALMERS". Indeed the Prospectus included Allis' projection of second quarter earnings (702a, 1132a) and noted certain adverse cost and price trends in 1967 which continued to affect its earnings in 1968 (*id.*).

Allis' management "decided that the disclosure had been very complete" (616a), and took no position on G&W's offer, because the Prospectus would give "all of the Allis-Chalmers stockholders . . . all the facts and figures" (651a). G&W representatives had no information about Allis other than that published in the press and in the Prospectus (319a-20a, 1482a-87a). Allis' management, lawyers and accountants each gave G&W formal written assurance that the Prospectus disclosure, as furnished by Allis, was complete and accurate in all material respects. (1421a-24a; 697a; 1425a).

C. The Exchange Offer and Continuing Disclosure

The Prospectus became effective June 1, 1968 (1031a-1142a) and was mailed by Allis to every Allis shareholder

at G&W's expense. The offer was subject to G&W shareholder approval at a meeting set for July 29, 1968, pursuant to a proxy statement setting forth the material on Allis (1018a-29a). Pursuant to the Prospectus G&W would accept up to 3,000,000 shares, pro rata up to July 19, and thereafter in order or receipt (1033a).

Disclosure continued throughout the offer. On July 5 Allis announced that its 1968 first half earnings would be substantially less than in 1967 (1433a-34a). G&W reaffirmed its offer despite Allis' decline, stating it sought a long-term investment (1436a). On July 16 Allis released half-year earnings of 45¢ (down from 81¢ in the first half of 1968).

Response to the Exchange Offer was quick and positive. By July 19 well over 3,000,000 shares had been properly tendered (1442a, 1459a). G&W's shareholder meeting on July 29 approved the offer, despite Allis' recurring setbacks, and thereby gave G&W for the first time more than 10% ownership of Allis' common stock (1145a).

D. Allis' Isolation of G&W Subsequent to the Exchange Offer

Allis' treatment of G&W was described in its own brief to the trial court: "No enterprise which finds itself the object of an undesirable suitor", it said, "need adopt an attitude of friendliness toward the unwanted mate."[4] This confirmed G&W's own apprehension of an "iron curtain of silence" following the Exchange Offer (323a). No G&W representative ever served as a director or officer of Allis, nor did G&W have any voice in Allis' management (662a-63a; 671a). On August 7 Allis slashed its regular quarterly dividend from 25¢ to 12½¢, as part of "its fighting" of G&W (*69a*). G&W had no warning of, and no participation in, the decision (622a-23a; 321a, 671a). Stevenson told Bluhdorn concurrently with public an-

4. Allis Post-trial Brief, Part II, May 14, 1973, at 27.

nouncement that there would be no advance discussion on such matters, because disclosure rules barred discussion "outside of a board of directors room" (615a).

On August 6 Mr. Bluhdorn had telephoned Mr. Stevenson to renew G&W's offer of technical assistance by suggesting that a G&W manufacturing vice-president, recognized by Allis as very capable, visit and assist in any way deemed convenient (321a, 613a). Upon his arrival on August 12, Allis gave him a "stockholder's tour of one of the facilities" (Dx-YYY at 11) and told him in effect that Allis would "like to be left alone . . . to mind their own business" (321a). G&W sent no further representatives.

On August 14 Bluhdorn was called by a Milwaukee newspaperman regarding a press conference called by Allis (321a-22a). Bluhdorn was ignorant of it and, not wishing to appear "foolish", telephoned Stevenson (321a-22a), but Stevenson said that "the information is not available to any one this evening" (618a). The next day, concurrent with "broad tape" announcement, Stevenson telephoned Bluhdorn, saying that Allis had just appointed a new president (323a). G&W had no part in any discussions regarding a new president (323a, 662a) and was never informed of Allis' search for one (619a-20a) because Allis viewed this as an "internal matter" which "should be kept to the board of directors and the management" (619a-20a).

E. Oppenheimer Purchase and the October 21 Press Release

G&W entered into an agreement (1154a-62a) with Oppenheimer Fund, Inc. ("Oppenheimer"), dated August 28, 1968, to acquire 248,000 Allis shares in exchange for 496,000 G&W Warrants and a price guarantee. Its consummation depended upon the satisfaction of certain conditions no later

than September 30, 1968, and the closing was held on that date.

Prior to the Oppenheimer closing, Stevenson came to New York on September 13, 1968 to see Bluhdorn and Judelson. On the eve of the Exchange Offer, the FTC had advised G&W and Allis that it intended to commence a formal proceeding to examine the effect of the proposed acquisition under the antimerger laws (1023a; 1469a). Bluhdorn complained that Allis' "planning department" was purposely misleading the FTC by asserting that Allis proposed to enter businesses similar to G&W's (328a-29a) although Allis' financial condition made such plans unrealistic (636a-37a, 1132a, 1441a, 1478a-80a, Dx-YYY at 23-25, 27-28). Stevenson denied this (622a), but parried the suggestion that Allis might invite Judelson to become a director by suggesting that the FTC would disapprove (625a). Although this was the first time he had met Bluhdorn, Stevenson concluded Bluhdorn was getting "nervous" (625a). To Judelson it was clear that Bluhdorn was "entirely frustrated" by the "ridiculousness of Allis-Chalmers going into ventures that would cost them two or $300 million . . . frustrated . . . not by their full cooperation with the [FTC] but by the mentality that would say you're going to do this sort of thing" (147a).

Stevenson said that during this meeting he gave G&W an unquantified "inkle" about Allis' continuing decline (622a). But according to Judelson, Stevenson never told G&W "anything" about Allis' affairs (1479a) and Bluhdorn's testimony was the same (323a, 334a). Critically, Stevenson's notes of the meeting, bearing the notation "major points" (1330a), contain no mention that Allis' performance was discussed at all, and Stevenson so admitted (663a-65a, 1330a, 1545a-46a). Because of this, along with Stevenson's uniform isolation of G&W from Allis' internal

processes (593a-95a, 597a, 613a, 615a, 618a, 662a, 671a) and other serious testimonial inconsistencies,[5] the trial court found that the substance and purpose of Stevenson's conversation was to "discourage G&W's retention of its stock position in Allis" (*48a*).

Subsequent events further belied Stevenson's recollection of the September 13 meeting, and made it irrelevant. On October 21, Stevenson met with Bluhdorn and others to advise G&W "at precisely the same time that the rest of the world and his shareholders were being informed" (330-31a, 628a-31a, 667a) that the "broad tape" was carrying Allis' projection of a $50 million loss in 1968 from both operating results and write-offs (330a-33a, 628a-29a, 667a). Far from being forewarned, this hit Bluhdorn "like a thunderbolt" (330a), and Stevenson conceded that G&W's officers were completely unprepared and "floored" (668a). The October 21 announcement appeared widely in the press along with detailed information on Allis' earnings prospects (702a-03a, 1494a-1503a). There were no other meetings, and G&W sold no Allis shares until well after the October 21 public announcements.

F. G&W's Sale of Allis Stock

Press reports of Allis' October 21 announcement indicated that G&W had received inquiries to purchase its Allis

---

5. Apart from the disparity between his careful notetaking and his testimony, Stevenson, who took early retirement in March 1969 (630a-31a), did not always remember to include the portion about giving an "inkle" in the September 13 conversation (1545a-46a), and had to be reminded of it by counsel (Dx-JJJJ-2 at 128), and could never articulate what he supposedly said to G&W but would only characterize it vaguely as "hints", "inkles" and "important" (see 611a, 622a, 656a). His testimony also included a monologue on the evils of exchange offers (600a-03a), claiming that G&W had inflicted "material damage" on Allis by buying its shares (691a-92a). However, the evidence showed instead that the financial failures of Allis long predated the Exchange Offer (636a-37a, 1435a), and were homegrown, as Stevenson's immediate successor, David C. Scott, frankly admitted (1498a-1503a).

shares (1503a). Stevenson took part in discussions to encourage G&W to sell to the Fiat interests in Italy (Dx-JJJJ-2 at 126-127). In late September, White Consolidated Industries, Inc. ("White") and G&W began discussions (347a, Bluhdorn dep. 87-90), and on October 31 they announced that White would acquire G&W's Allis shares (Dx-GGGG, ex. 4).

The agreement (the "White Agreement"), dated as of October 31, 1968 but not made final until later, contained numerous conditions to be satisfied at the closing (1163a-76a). On December 6, 1968, G&W sold its Allis shares to White in exchange for (a) 250,000 unregistered shares of White common stock; (b) an unsecured 8½% promissory note in the face amount of $93,680,000 payable in 6 months; and (c) only $20,000,000 in cash, since White had not been able to borrow more at that time (1163a-64a, 1222a, 1230a, 1506a). White announced its purchase as part of a plan to acquire Allis (1507a).

G. Subsequent Events (Related Primarily to the Cross-Petition)

Shortly after the closing and again in March 1969, G&W tried to sell the White note through a New York investment house, but was told that the note was "not financible" and would have to be factored at a 10% to 15% discount from its face value (484a-89a, 492a-93a, 497a). Twelve days after the closing, Allis moved for a preliminary injunction in a Delaware federal court to block White's acquisition on antitrust grounds (1519a). White's chief financial officer gave evidence that if its investment in Allis stock were inhibited, White would incur "serious adverse" financial consequences and face severe difficulty in discharging the note (1520a). Allis lost its motion on January 22, 1969, *Allis-Chalmers Manufacturing Co.* v. *White Consolidated Industries, Inc.*, 294 F. Supp. 1263 (D. Del. 1969), and the Third

Circuit denied its application for a temporary restraining order pending appeal on February 3, 414 F.2d 506, 509, n.5 (3 Cir. 1969).

Following Allis' apparent defeat, White secured a credit agreement on March 5 by which it obtained funds to discharge the note then held by G&W (1219a), and caused the note to be paid on March 20 with interest (1295a). But on May 5, the Third Circuit enjoined the annual meeting at which White hoped to gain control (1536a; 414 F.2d at 509 n.6). On July 18, 1969 it reversed the district court and enjoined White from voting any or acquiring additional Allis shares or seeking board representation, thereby halting White's takeover attempt (414 F.2d at 526). The banks which had given White loans to pay the note became "very concerned" and sought financing from other sources because of White's financial trouble (499a-500a). This could not be arranged until 2 years later (500a, 1253a).

While it was pursuing its claims against White in Delaware, Allis commenced this action against G&W in the Eastern District of Wisconsin on January 6, 1969.

The Proceedings Below

A. The District Court

This case was tried in March 1973 on both issues of liability and the amount of profits, if any, on which expert economic testimony was adduced. The district court found G&W had no access to inside information either before or after it acquired Allis shares (*47a*); that there had been "no showing of wrongdoing" (*72a*); and that G&W "did nothing wrong, as far as speculative abuses are concerned" (*74a*). Rather G&W had been the target of a program of isolation and hostility by Allis' management, the court finding, *inter alia*, that Allis had halved its dividend "in its

fighting" of G&W (*69a*). Nevertheless the court felt constrained to impose technical liability and awarded $1,135,838 of "profit realized." However, it reflected its distaste for Allis' position by refusing its request for an award of dividends and prejudgment interest, calling these "unconscionable" and "retributive" on the facts of the case (*id.*).

B. The Court of Appeals

Allis did not pursue its claims for dividends and interest on appeal but continued to press certain valuation doctrines designed arbitrarily to "maximize" the recovery under § 16(b), claiming its $1.1 million windfall should be increased to over $12 million. G&W principally appealed on the issue of liability. The Court of Appeals for the Seventh Circuit, in an opinion by Judge Swygert for a panel including Judge Pell and Mr. Justice Clark, unanimously held that G&W's initial exchange offer acquisition was outside the scope and purpose of § 16(b), and rehearing en banc was denied upon a poll of the full court (*6a n.5*). Expressing general agreement with the Ninth Circuit's decision in *Provident Securities Co.* v. *Foremost-McKesson, Inc.*, 506 F.2d 601 (9 Cir. 1974), the court held that the purchase by which an outsider with no prior relationship with the issuer acquires more than 10% of the issuer's shares does not trigger § 16(b)'s automatic liability.

The court of appeals found, as had the district court, that "there is no possibility under the facts of this case that Gulf & Western could have made 'unfair use of information . . . obtained . . . by reason of [its] relationship to [Allis-Chalmers]' " in making the Exchange Offer acquisition (*5a-6a*). Examining the statutory language "in its totality" as well as the legislative history, the court determined that "the statute was never intended to reach such a transaction." (*6a*)

Rather, the court found, "Congress had in mind a specific type of two-part transaction consisting either of a purchase and subsequent sale, or a sale and subsequent repurchase" (*15a*), which Congress had viewed as a "conceptual unit" (*16a*). Since "the section was aimed at preventing speculation based on abuse on inside information, the section must have contemplated a *pre-existing* beneficial interest" (*id.*). Where the investor lacked insider status prior to the opening purchase, the court reasoned, "the full purchase/sale transaction could hardly be characterized as 'speculative' from the standpoint of insider abuse" (*id.*). Thus, G&W's acquisition of Allis shares in the Exchange Offer was held outside the statute.

Because G&W's purchase from Oppenheimer occurred when G&W was already a 10% owner, the court found liability. It also held that the district court had overstated the purchase price G&W paid to Oppenheimer by valuing incorrectly G&W's guarantee of the future value of its warrants. This resulted in increasing Allis' recovery by $1,106,080.

With respect to the value of the unusual $93,680,000 White note, the court disallowed the discounted fair market value which had been found by the district court on the basis of the evidence. The Court did not contend that the district court's finding was "clearly erroneous", but held that fair market value was not the applicable test; rather, the face amount of the note was said to be controlling (whatever the actual value) if paid before trial. This aspect of the decision is the subject of G&W's cross-petition. This revaluation of the note would have exposed G&W to a $4 million addition to the judgment, if the Court had not found the 3,000,000 Exchange Offer shares outside the statute.

Certain other determinations concerning valuation are not relevant here. Moreover, because the court held that

G&W's purchase while an outsider was not within the statute, it was not required to consider certain other issues (which would remain for consideration on remand should this Court disagree with the decision of the court of appeals[6]).

Contrary to certain erroneous suggestions made in the petition (at 7) and in oral argument by counsel for Foremost-McKesson, Inc. in No. 74-742 (Transcript at 9, October 7, 1975), G&W has always contended that the initial acquisition by an outsider is not a chargeable "purchase" under § 16(b). Specific references to the statutory proviso are contained in two affirmative defenses raised in G&W's answer (46a-47a). Indeed, it will be recalled that G&W was granted leave by the Court to file a brief as amicus curiae in *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418 (1972) in support of its position, urging that the question here not be indirectly reflected upon in the *Reliance* case, since it was not then before the Court at the instance of the parties.[7] The Court's opinion expressly noted, "that question is not before us." 404 U.S. at 421.

---

6. These issues include: (1) whether the acquisition by exchange offer is excludable under the "pragmatic" test, even if the court's assessment of the statutory proviso is erroneous; (2) whether the district court erroneously refused to recognize, for valuation purposes, the essentially undisputed impact of arbitrage on G&W warrants during the exchange offer, thus charging G&W with an artificially low purchase price for the Allis shares (see *57a n.6)*.

7. Motion of Gulf & Western Industries, Inc. for Leave to File the Accompanying Brief as Amicus Curiae in Support of the Position of the Respondent, No. 1332, October Term 1971, pp. 2-4.

The Decision Below on the Question Presented Should be Summarily Affirmed if Certiorari is Granted; Alternatively, the Writ May Properly be Denied.

Respondent does not oppose the grant of a writ of certiorari—although it believes the decision below to be correct—because the same legal issue on different facts is currently under review in the *Foremost-McKesson* case. Respondent was permitted to file a brief as amicus curiae in that case, which is appended hereto.[8] However, it has not had, and would welcome, the opportunity of plenary argument so that the "first-purchase issue" might be appraised in light of the compelling facts in its own case. Moreover, because the facts differ substantially from those in *Foremost-McKesson,* we submit that certiorari may be denied here whatever the result in that case.

The statutory purpose cannot be served by treating G&W's acquisition by Exchange Offer—announced well in advance, available to all shareholders on an open and equal basis, and preceded by complete financial disclosure—as if it were an insider's purchase on advance information. G&W was an "outsider" when it made the Exchange Offer (*46a*). Afterwards it was viewed and treated by Allis as an "undesirable suitor" and "unwanted mate". It sold its shares only after it had been systematically isolated by Allis' management and put remote from its enormous investment, and following further public disclosure of Allis' financial condition (1494a-1503a). There was no access to inside information. Given the undisputed sequence of events and disclosures, G&W could not use it even if it had any. The statutory purpose cannot be served by the imposition of a purposeless liability.

Petitioner's position would treat a defendant who owned *none* of the issuer's shares at the time of its purchase the

8. Citations to respondent's prior brief as amicus curiae are in the form "(1b)".

same as one who already owned over ten percent, thereby treating outsiders and insiders alike. Such an illogical reading would subvert the terms of the statute, its rationale and its purpose, as revealed by the legislative history. Specifically, the statutory proviso, applicable only to *non-managerial* "beneficial owners", expressly bars liability except where the specified "relationship to the issuer" existed "at the time of" the purchase. This gives an unmistakable basis for charging an otherwise innocent—and indeed, as here, a potentially beneficial—commercial event. Otherwise, the statute would act as a capricious barrier to important economic transactions.

Thus, when petitioner tries to deprecate the statutory exemption, saying it makes liability depend upon the "calculated or fortuitous reason that the beneficial owner purchased all such stock in one transaction," (Pet. at 9), this simply ignores the very basis upon which Congress made liability depend as an essential, elemental matter, *viz:* the specified "relationship to the issuer" at the time the purchase is undertaken.

This is not to say that there is no federal policy respecting the acquisition of a large block of shares by an outsider. Rather, that type of transaction raises concerns which are very different from those inherent in the problem of insider trading, and is addressed by other areas of the federal statutory system.[9] This Court has said, "If there are evils to be redressed by way of deterring those who would make tender offers, § 16(b) does not appear to us to have been designed for this task", *Kern County Land Co.* v. *Occi-*

9. Congress recently revised regulations covering this area in the Williams Act Amendments to the Securities Exchange Act of 1934, §§ 13(d)-(e); 14(d)-(f); 15 U.S.C. §§ 78m(d)-(e); 78n(d)-(f). Moreover, where, as here, the outsider offers its own securities in the acquisition, it must file a Registration Statement and Prospectus under the Securities Act of 1933, and must attempt to set forth detailed information about the financial condition of the issuer of the shares to be acquired, as well as its own. SEC Rule 409, 17 C.F.R. § 230.409; General Instruction F to SEC Form S-1, 2 CCH FED. SEC. L. REP. ¶8006 at 7016. See pp. 4-5, *supra.*

dental Petroleum Corp., 411 U.S. 582, 597-98 (1973). The blurring of these quite different problems underlies petitioner's arguments.

A related error inheres in petitioner's reliance (Pet. at 13) on the decision in *Reliance Electric Co.* v. *Emerson Electric Co., supra,* which, to the contrary, makes clear the inapplicability of the statute here. The heart of the problem in *Reliance* was that the "second sale" could analytically be viewed as within the statutory intent, because "tainted" by the same presumed access to information that infected the immediately preceding "first sale". The question therefore was whether the express statutory exclusion could be avoided so that the second sale might be reached, but the Court rejected the proposed circumvention. Here, there is not even an analytical argument that the initial purchase is theoretically tainted by access to inside information. Thus, given the statutory exemptive language, liability would *a fortiori* be wrong. Indeed, the whole thrust of the *Reliance* decision was to reinforce the exemptive proviso, holding that it is one of the "objective standards" of § 16(b) which "cannot be disregarded", 404 U.S. at 423, 424.

There has never been a satisfactory basis for charging an outsider's initial ten-percent transaction, and there has been no consistent line of authority to support it. For almost 15 years, there were only two decisions on the issue, each contrary to the other: one, *Stella* v. *Graham-Paige Motors Corp.*, 104 F. Supp. 957 (S.D.N.Y. 1952), decided on a preliminary motion and later affirmed without analysis by a divided court, 232 F.2d 299 (2 Cir.), *cert. denied,* 352 U.S. 831 (1956); the other, *Arkansas-Louisiana Gas Co.* v. *W. R. Stephens Investment Co.,* 141 F. Supp. 841 (W.D. Ark. 1956), which was not appealed.

The decision in the *Stella* case (in which there was no liability because there were no profits), was based upon the theory of *recurrent* insider status where, hypothetically, an investor could buy stock, sell down to under ten percent, and then repeat the process "ad infinitum", 104 F. Supp. at

959. There are several difficulties with the theory, not the least of which is that it has not the slightest application where the defendant, as here, had no prior relationship at the time of the very transaction in question. Another is that hypothetical "taint" is not a basis for ignoring the exemption. *Reliance Electric Co.* v. *Emerson Electric Co., supra.* Yet a more basic one is that a stockholder trading in and out of a ten percent position does not even fit the mold of the "insider" which Congress envisioned as the likely possessor of inside information. Indeed, this Court suggested in *Reliance* that

> "it may be that Congress regarded one with a long-term investment of more than 10% as more likely to have access to inside information than one who moves in and out of the 10% category." 404 U.S. at 424.

The next time it spoke on the issue, in *Newmark* v. *RKO General, Inc.*, 425 F.2d 348 (2 Cir.), *cert. denied*, 400 U.S. 854 (1970), the Second Circuit did not adopt the rationale of the *Stella* case. Rather, in dictum not remotely related to the facts of its case, the court first conceded that the initial purchase *cannot* be presumed to be based on inside information, but added that *subsequently* acquired information would enable the alleged insider "to sell his shares at the moment most advantageous to him." 425 F.2d at 356. These comments were pure dictum, since the court found that the defendant both was in fact a statutory "beneficial owner" *before*, and actually used inside information at the time of, the purchase. *Id.* But beyond this, the suggestion in the *Newmark* dictum has uniformly been criticized as irrelevant to the problem and providing the basis for only a Rule 10b-5 action—if indeed there was actual use of inside information. See *e.g., Gold* v. *Sloan*, 486 F.2d 340, 349 (4 Cir. 1973), *cert. denied*, 419 U.S. 873 (1974); Comment, *Section 16(b): An Alternative Approach to the Six-Month*

Limitation Period, 20 U.C.L.A. L. Rev., 1289, 1297 (1973); Note, *Stock Exchanges Pursuant to Corporate Consolidation: A Section 16(b) "Purchase or Sale"?,* 117 U. Pa. L. Rev. 1034, 1041-42 n. 39 (1969).

Not surprisingly, the Second Circuit in *Perine* v. *William Norton & Co.,* 509 F.2d 114 (2 Cir. 1974), while paying respect to its own prior decisions, nevertheless substantially undercut their support by holding that, if any underwriter who made a ten-percent purchase was not a "pre-existing insider", it was not required to satisfy all conditions of SEC Rule 16b-2 in order to exempt the transaction. It thus gave determinative weight to the absence of a prior inside relationship in a § 16(b) case involving a mere shareholder. 509 F.2d at 120-121.

Petitioner wholly ignores that Congress made assumptions with respect to managerial insiders (officers and directors) very different from those respecting nonmanagerial shareholders, and that this distinction underlies the statutory proviso at issue. *Adler* v. *Klawans,* 267 F.2d 840 (2 Cir. 1959). Officers and directors have not merely a probability of access to, but indeed a duty to become apprised of, internal corporate information. In contrast, large shareholders need never have such access; and the circumstances surrounding the acquisition of shares are not predictable. Clearly, large shareholdings may be acquired without any confidential involvement. The instant case, involving unquestioned compliance with federal advance disclosure requisites, is exemplary.

According to its draftsmen, § 16(b) was:

> "aimed at protecting the public 'by preventing directors, officers, and principal stockholders of a corporation . . . from speculating in stock on the basis of information not available to others' S. Rep. No. 792, 73d Cong., 2d Sess., 9 (1934)" *Kern County Land Co.* v. *Occidental Petroleum Corp., supra,* 411 U.S. at 592.

Disclosure, especially by an outsider, goes to the heart of the problem at which § 16(b) was aimed, as the Fourth Circuit noted recently:

> "[I]t is the unfair use of inside information against which the statute is directed and plainly where there has been full disclosure . . . the potential for unfairness and any basis for invoking the statute disappears." *Gold* v. *Sloan, supra,* 486 F.2d at 349.

An Exchange Offer, characterized by safeguards against unfairness, is wholly unsuited for § 16(b)'s brand of abuse. The open offer to all shareholders, ratable treatment, the premium above market value, the possibility of substantial future benefits for both corporations involved, and especially the full prior disclosure of all material financial information—all set an Exchange Offer starkly apart from the covert market trading which Congress had in mind in enacting § 16(b).

Indeed, one much-cited article contrasts an exchange offer and its counterpart, the cash tender offer (the "purchases" in the *Kern County* case), from the viewpoint of trading fairness. While on one hand a cash tender offer is merely a "form of a market purchase", on the other "an exchange offer closely resembles a merger transaction", inextricably bound up with the provision of "sufficient information" as to the target corporation and surrounded by numerous safeguards.[10] "Exchange Offers are unusual."[11] One made by an outsider can hardly be viewed

---

10. A. Fleischer & R. Mundheim, *Corporate Acquisition by Tender Offer,* 115 U. PA. L. REV. 317, 348-349 (1967).

11. "Exchange Offers are unusual. First, . . . they must be registered under the Securities Act of 1933 and will have to comply with state Blue Sky laws. . . . Second, to make the requisite disclosures about the sought-after company may require the cooperation of management. . . . Third, exchange offers lack the element of surprise. . . . Finally, in an exchange offer involving registration under the

as one of the "class of transactions in which the possibility of abuse was believed to be intolerably great," *Reliance Electric Co.* v. *Emerson Electric Co., supra,* 404 U.S. at 422, and to which the statute is limited. *Id.*

The issue in *Kern County* was whether the "closing" transaction was a sale. Where the question is whether the opening acquisition is chargeable as a § 16(b) "purchase", the inquiry asks whether the acquisition was "an anticipatory action based upon inside information" looking toward a subsequent profit-taking sale. Comment, *supra,* 20 U.C.L.A. L. REV. at 1295. In *Gold* v. *Sloan, supra,* the Fourth Circuit held that inquiry into an opening transaction must focus upon the critical period *preceding* the alleged "purchase", and that

> "if there is in the transaction itself, and the negotiations leading up to it, an absence of abuse, then the deterrent force of the statute is unnecessary and liability is not in order." 486 F.2d at 343.

In appraising whether an opening transaction would be charged, it held that the relevant facts were those leading up to the transaction, since

> "circumstances or events occurring after the transaction in question cannot possibly be relevant in determining whether there was a possibility of speculative

---

Securities Act, [the offeror] is severely restricted under § 5 of the act, 48 Stat. 77 (1933), as amended, 15 U.S.C. § 77e (1964), with respect to statements made. . . .

"[U]nless stock has already been authorized, the offeror must secure a vote of its shareholders for an appropriate amendment to its charter. . . . [I]ssuance of the shares in connection with the exchange offer may need shareholder approval under certain state laws. . . . or, under the rules of the major exchanges. . . . See, e.g., NEW YORK STOCK EXCHANGE, COMPANY MANUAL A-284(3). Finally, if the shares to be issued by the offeror constitute a substantial part of its outstanding stock, it may be contended that the transaction constitutes a de facto merger. . . ." *Id.* 348 n. 119.

abuse when such transaction occurred," 486 F.2d at 349.[12]

When G&W decided to make its Exchange Offer, it had no association with Allis and was not even a shareholder; thus its decision "could not have been based on inside information obtained from substantial stockholdings that did not yet exist." *Kern County Land Co.* v. *Occidental Petroleum Corp., supra,* 411 U.S. at 597. To comply with disclosure rules, it announced its decision immediately (1400a-01a), stating the exact consideration it would offer (*id.*). This amount, determined while G&W was an outsider (*46a*), never varied (1031a). The announcement gave the market ample time to anticipate the offer and adjust for it. *See* Note, *Insider Liability for Short-Swing Profits: The Substance and Function of the Pragmatic Approach,* 72 MICH. L. REV. 592, 612 (1974). In the next two months G&W made intensive disclosure efforts, even paying Allis' costs to ensure the quality and completeness of disclosure. Both G&W and Allis were subject to severe civil and criminal sanctions for any material deficiency in the disclosure,[13] and there was no deficiency (546a-47a). Allis, its lawyers and accountants gave G&W written assurance that the disclosure was com-

12. "[F]ocusing on the possibility of inside information after the initial transaction is an irrelevant criterion" when the issue is whether an initial acquisition is an abusive "purchase". Comment, 20 U.C.L.A. L. REV., *supra,* at 1297. *See also Perine* v. *William Norton & Co., supra.*

13. 15 U.S.C. §§ 77k, *l,* q, x; SEC Rule 409, 17 C.F.R. § 230.409; General Instruction F for Form S-1, 2 CCH FED. SEC. L. REP. ¶ 8006 at 7016. G&W would be strictly liable for any faults in disclosure. 15 U.S.C. § 77k. Moreover, the intentional provision of false information would give rise to criminal liability under the 1933 Act for aiding and abetting. Rule 10b-5, issued under § 10 of the 1934 Act, 15 U.S.C. § 78j, also bore directly on G&W and Allis' disclosure obligations. *See, e.g., S.E.C.* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 839, 891 (2 Cir. 1968), *cert. denied,* 394 U.S. 976 (1969); *Heit* v. *Weitzen,* 402 F.2d 909 (2 Cir. 1968), *cert. denied,* 395 U.S. 903 (1969); *Escott* v. *BarChris Const. Co.,* 283 F. Supp. 643 (S.D.N.Y. 1968).

plete (1422a-32a). Indeed the Prospectus even provided the latest earnings projections and assessments of price and cost trends (1132a) at the insistence of counsel (1415a). G&W could acquire no shares under the Exchange Offer until after the information was distributed to the investing public. In addition, in voting upon the Exchange Offer, G&W's shareholders had exactly the same information as did Allis' shareholders; the proxy statement and the Prospectus were substantially identical. This was simply unsuited to unfair informational abuse. Disclosure about Allis continued throughout the offering period (1433a-41a). Although the news indicated further deteriorating earnings —continuing the trend since 1967—G&W nevertheless went forward with the acquisition at a premium price.

Such a transaction could not possibly have been in anticipation of a short-swing profit based on inside information. Full disclosure at the critical time (or the pointed absence of it), has been given repeated emphasis in § 16(b) cases,[14] since "if any relevant information that an insider may have prior to beginning his short swing is shared by the investing public, there is no 'possibility' of abuse." Note, *supra*, 72 MICH. L. REV. at 611 (1974). Similarly, the idea that Allis should gain a windfall recovery because it succeeded in its policy of isolating G&W, which had offered Allis shareholders both a premium price and the prospect that Allis' decline might be reversed through professional aid, must be "repugnant to our sense of

14. *See Kern County Land Co.* v. *Occidental Petroleum Corp., supra*, 411 U.S. at 600; *Roberts* v. *Eaton*, 212 F.2d 82, 83 (2 Cir.), *cert. denied*, 348 U.S. 827 (1954) (proxy statement provided a "full discussion of the proposal"); *Ferraiolo* v. *Newman*, 259 F.2d 342, 346 (6 Cir. 1958), *cert. denied*, 359 U.S. 927 (1959) ("full disclosure was made"); *Petteys* v. *Butler*, 367 F.2d 528, 537 (8 Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967) ("the stockholders were adequately informed"). *Compare: Newmark* v. *RKO General, Inc., supra*, 425 F.2d at 356.

equity." See *Abrams* v. *Occidental Petroleum Corp.*, 450 F.2d 157, 164 (2 Cir. 1971), *aff'd sub nom. Kern County Land Co.* v. *Occidental Petroleum Corp., supra.*

Although subsequent events do not directly bear on whether an opening acquisition was based on inside speculation, they are nevertheless instructive in showing how Allis contrived to dispose of its "unwanted mate". Allis' management could not appeal to the Allis shareholders to refuse G&W's offer or otherwise openly oppose because Allis' shareholders were "unhappy" with management, "antagonistic", and upset in particular by its apparent undoing of previous offers (639a-640a). Nor could management arrange a "defensive merger", as in *Kern County,* since it had alienated the likely candidates (DX-JJJJ-1 at 16, 18-22). Instead, it adopted a covert policy to discourage G&W and put it remote from its investment. G&W was even worse off than "simply a disaffected stockholder . . . tolerated but not welcomed by the management", *Gold* v. *Sloan, supra,* 486 F.2d at 344, because G&W was not tolerated.

Allis slashed its dividend right after G&W made its acquisition, advising G&W only simultaneously with public announcement and making it clear that there would be no advance consultation (615a). When Bluhdorn suggested in passing that Judelson might be invited onto the Allis board, Stevenson recorded it in his notes as a "threat" (1326a); the next time he hid behind the FTC inquiry (625a). When G&W sent an expert manufacturing trouble-shooter to Allis' headquarters to give aid, he was run through one facility and sent back to New York (321a, 613a). While Allis searched for a new president, it kept G&W totally in the dark, so that even a Milwaukee newspaperman knew more about Allis than G&W did, and Allis would say nothing when G&W inquired (618a). And although Stevenson claimed at trial that he gave G&W weighty and important "hints" and "inkles" about Allis' performance at his September 13 visit, all the hard evidence suggested other-

wise. His notes disclose no discussion of Allis' performance (1330a), and even Stevenson conceded that when he subsequently told G&W, simultaneously with public announcement on October 21 (330-31a; 667a), of Allis' real financial results, G&W's officers, far from reflecting forewarning, were "floored" (667a). G&W sold no shares until well after Allis' public disclosures. The trial court rejected Stevenson's professed motives, and saw his September 13 visit to G&W as part of the continuing effort to give G&W a sour and distant view of its enormous investment in Allis (*48a*). Even Stevenson's own version was robbed of any relevance by the financial disclosures of October 21.

Because G&W has previously devoted attention to unfolding of the legislative history preceding the enactment of Section 16(b) (10b-17b), it would not be useful to dwell on it here, except to take note of the attack made by petitioner on the analysis of both the Seventh Circuit and the Ninth Circuit (Pet. at 12-13). The entirety of that attack is based, as we best understand it, on the claim that it was somehow error for these courts to go back to "a Senate bill" (*id.* 12)—which, petitioner fails to point out, was the "Fletcher-Rayburn" bill introduced in *both* the House and Senate[15]—in order to assess the intent of the legislation. In fact, the Fletcher-Rayburn bill alone was the subject of the legislative hearings which are uniformly relied upon as establishing the purpose and operation of this statute. (See note 15, *infra*) Indeed, when petitioner claims that a

15. S. 2693, introduced by Sen. Fletcher and referred to the Senate Banking and Currency Committee, February 9, 1934, considered in *Hearings on S. Res. 84 & S. Res. 97 Before the Senate Committee on Banking and Currency*, 73d Cong., 2d Sess. (1934); H.R. 7852, introduced by Rep. Rayburn and referred to the House Committee on Interstate and Foreign Commerce, February 10, 1934, considered in *Hearings on H. R. 7852 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. (1934).

subsequent unspecified "House bill" must be regarded as the "lineal predecessor" of Section 16(b) (Pet. at 12) this turns out to be an entirely arbitrary choice of pedigree, and simply wrong. The only bill voted upon by the House prior to the conference committee's final version was H.R. 9323, which omitted entirely the provision now known as Section 16(b). See 12b-13b.

Finally, petitioner's repeated invocations of the statutory "purpose" as a basis for liability deserve no consideration, for they beg the question and ignore the fact that the purpose of the statute is a limited one. Section 16(b) is served by giving it application "without extending the reach of the statute beyond its intended limits." *Kern County Land Co.* v. *Occidental Petroleum Corp., supra,* 411 U.S. at 595. A purchase by an outsider who never becomes an officer or director is not logically, nor within the statutory language, one of the "class of transactions in which the possibility of abuse is intolerably great," *Reliance Electric Co.* v. *Emerson Electric Co., supra,* 404 U.S. at 422, and is therefore not within the automatic liability imposed by the statute.

Conclusion

For the reasons stated, the writ of certiorari may be granted and the decision below summarily affirmed on the question presented, or, in the alternative, the writ of certiorari should be denied, since the decision below was clearly correct.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
One Battery Park Plaza
New York, New York 10004
Counsel for Gulf & Western Industries, Inc.

Of Counsel:

JOHN A. GUZZETTA
BERNHARDT K. WRUBLE
CONRAD K. HARPER
LINDSAY A. LOVEJOY, JR.
Simpson Thacher & Bartlett

November 15, 1975